92-1999

Supreme Court, U.S.
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No. _____
(Previously heard under No. 91-1800)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

IN RE: HARLOW FAY, INC.,

Debtor.

HARLOW FAY, INC.,

Petitioner,

v.

FEDERAL LAND BANK OF ST. LOUIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI (AND OR MANDAMUS) TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND FOR OTHER RELIEF

PETITION

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QUESTIONS PRESENTED

I. Whether the Eighth Circuit Court of Appeals obeyed the order of remand of this Court when, in the face of this court's vacation of its original opinion and judgment, the Eighth Circuit re-entered substantially the same judgment and opinion.

2. Whether the Eighth Circuit Court of Appeals abused its discretion when it re-entered its order affirming the District Court's dismissal of Debtor's appeal to it in this cause on the ground that the Debtor's brief was untimely filed;

3. Whether the Eighth Circuit Court of Appeals applied the four-pronged test outlined in Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. _____ (1993), and whether it erred in holding that an

upheaval in a law firm's practice can never constitute excusable neglect;

4. Whether the standard for late filing of briefs should be one of good cause shown and reasonable excuse.

5. Whether overriding principles of fairness, justice and equity would require the District Court to hear Debtor's appeal on its merits so that it might not be foreclosed by its attorney's inability to perform.

LIST OF PARTIES

The parties to this action are as follows:

The Petitioner is Harlow Fay, Inc., Box 102, LaClede MO., 64651.

The Petitioner's Attorney in this Court and below is William L. Needler of William L. Needler & Associates, Ltd., Airport Road, P.O. Box 177, Ogallala, NE 69153, Phone (308) 284-4505; and 1430 Ridge Road, Northbrook, IL 60062 Phone (708) 559-8330.

Below Petitioner was also represented by local counsel: Jackie Bailey, 116 West Ritchie, Marceline, MO 64658.

The Respondent is Federal Land Bank (Farm Credit Bank) 1415 Olive Street, St. Louis, MO 63101.

The Respondent's Attorney is Charles E. Rendlen, III, P.O. Box 1255, 108 North

Third Street, Hannibal, MO 64628.

An interested party is Farmers Home Administration, #1 Fairground Road, Brookfield, MO 64628.

Farmers Home Administration is represented by the U.S. Attorney, United States Court House, 1114 Market Street, St. Louis, MO 63101.

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v.

FEDERAL LAND BANK OF
ST. LOUIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI (AND/OR MANDAMUS) TO THE EIGHTH CIRCUIT COURT OF APPEALS AND FOR OTHER RELIEF AS MAY BE JUST.

PETITION

The Petitioner, Harlow Fay, Inc. prays that a writ of certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Eighth Circuit, entered on May 21, 1993, there

heard on remand from this Court's grant of certiorari and vacation of substantially the same judgment, entered by the Court of Appeals on December 17, 1992. On June 9, 1993, the Court of Appeals entered an order staying its mandate for 90 days or until this Court has acted on the Petition, whichever is earlier.

With the filing of this Petition, Appellant is presenting a motion for stay pending review to Justice Harry A. Blackmun of this Court. Additionally, Petitioner requests this Court to order Respondent to pay the Clerk's costs previously imposed and any other costs resulting from these proceedings.

OPINIONS BELOW

The first opinion of the Court of Appeals for the Eighth Circuit, entered on December 17, 1992, is reported as

follows: In re Harlow Fay, Inc. (Harlow Fay, Inc. v. Federal Land Bank of St. Louis, 951 F. 2d 175 (8th Cir. 1991), and also appears at A 10-14 of the Appendix to this Petition. The second Opinion and judgment of the Eighth Circuit Court of Appeals, entered on May 21, 1993, made necessary by this Court's order of remand, is not published and is to be found at A 1-9.[1]

The District Court Opinion, rendered on May 5, 1989, dismissing the Debtor's appeal for failure to file a timely brief, is not reported but appears at A 58-61. The District Court's judgment dismissing Debtor's appeal appears at A 57. The bankruptcy court's judgment dismissing the case appears at A 62.

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[1] "A" stands for Appendix to this Petition

JURISDICTION

This Court's jurisdiction is derived under 28 U.S.C., sec. 1254(1), but this Court also has the power to enter writs in aid of the enforcement of its orders and to compel obedience to its mandates.

The bankruptcy court derived its jurisdiction by referral pursuant to 28 U.S.C., sec. 157. The district court derived its original jurisdiction of bankruptcy cases pursuant to 28 U.S.C., sec. 1334 and its appellate jurisdiction from 28 U.S.C., sec. 158. The Court of Appeals gained its jurisdiction under 28 U.S.C., sec. 158.

STATUTES INVOLVED

This case involves the scope, meaning and construction of the following Rules:

1. Bankruptcy Rule 8008(a) appears

at A 64.

2. Bankruptcy Rule 8009(a) appears at A 65-66.

3. Bankruptcy Rule 9006(b)(1)(2) appears at A 66-68.

4. Federal Rule of Civil Procedure 6(b)(1)(2) appears at A 68.

5. Federal Rule of Civil Procedure 60(b)(1) appears at A 69.

6. Federal Rule of Appellate Procedure 31(c) appears at A 70.

7. Federal Rule of Appellate Procedure 26(b) appears at A 70-71.

8. Federal Rule of Appellate Procedure 4(a)(5) appears at A 71-72.

STATEMENT OF THE CASE

I.

Remand And Subsequent Opinion

This Court, on April 5, 1993 issued the following order to the Eighth Circuit Court of Appeals:

CERTIORARI -- SUMMARY DISPOSITION

91-1800 HARLOW FAY, INC. V. FED LAND BANK OF ST. LOUIS

The petition for a writ of ceritorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Pioneer Investment Services Company v. Brunswick Limited Partnership, 507 U.S. _____(1993).

The Eighth Circuit Court of Appeals, however, did not follow the four-part balancing test of Pioneer. Instead, the Eighth Circuit reiterated its view that upheaval in a law practice can never constitute excusable neglect and simply erroneously added this Court's opinion in Pioneer to its list of authorities upholding this idea. The Eighth Circuit quotes this Court as saying: "We give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date."

Pioneer, at 113 S. Ct. at 1499.[2]

The Eighth Circuit, on remand, unilaterally and without requesting any comment from the parties, entered an order substantially to the same effect and substance as before.

II.
Background Facts About the Case

This case arises from the farm crisis of the mid-1980's which has persisted in varying degrees down to the present.

After the run-up in farm prices and high inflation of the early 1980's farmers were hard-pressed to stay afloat

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[2]That may have been true in Pioneer in relation to the bar date involved, but at bar there would have been no point in this Court remanding this case if it were true that an attorney's inability to perform, because of upheaval in his law practice, could never constitute excusable neglect.

after the bubble burst and prices of farm commodities and land collapsed. (See A 42-50).

Harlow Fay, Inc. is the corporate organization of the Fay family. It was forced to file a Petition under Chapter 11 in 1985.

A Plan of Reorganization, was confirmed on May 23, 1986. No evidence was adduced at the hearing regarding the confirmation standards of 11 U.S.C., sec. 1129, including the feasibility or valuation of the Plan. The order confirming the Plan was not the official form which lists the specific findings to support the requirements of Section 1129, but was a summary version. (See Short Form No 31, West, Bankruptcy Act, Rules & Forms, 87 Rev. ed., p. 739, 740).

The Plan treated the Federal Land

Bank of St. Louis (FLB) as having a secured claim for $284,000.00. Debtor contends that the actual secured claim, or the value of 500 acres of land, was not $284,000.00; that this figure was from an earlier irrelevant date. Because the $284,000.00 figure was used, the annual, amortized payment was higher than should have been allowed. The higher payments resulted in a Plan that was tenuous from the beginning, and in the end proved to be unworkable.

In 1987, when Plan payments could no longer be made, the Debtor filed a modification of the Plan to correct the valuation. The modification also treated the claims of other creditors, i.e. the Farmers Home Administration (FmHA) and the Bank of Brookfield. Debtor, the Bank and the FmHA were able to enter into

stipulations approving the modifications.

Meanwhile, however, FLB and the above other creditors had filed motions to dismiss Debtor's Chapter 11 proceeding. A hearing was conducted on the motions to dismiss. Officers of the Debtor testified as to why the old plan was not feasible, why the plan as modified would be feasible, the propriety of the modified valuation, and other matters.

Amended modifications were to be filed on December 6, 1988 pursuant to the bankruptcy court's order of November 16, 1988. Meanwhile Debtor's counsel worked to iron out the modifications with the creditors.

Due to a press of emergency matters, however, the modification involving FLB was submitted to the Court pursuant to a

motion to file instanter at the hearing on December 13, 1988.

At the December 13, 1988 hearing, the Court approved the modifications of the plan pursuant to the stipulations between the Debtor and FmHA and the Bank. The Court, however, granted the motion of FLB to dismiss the Chapter 11 proceeding, finding a material default in the confirmed plan, and denying Debtor's motion to modify. Debtor's motion to reconsider was summarily denied. The appeal, which is partly the subject matter of the litigation which brings us to this Court, was lodged in the District Court, contending, inter alia, that the above was clearly erroneous and an abuse of discretion (it being obvious that the debtor could reorganize under a modified plan, as

demonstrated by the evidence and agreement of the other creditors).

III.

Facts Bearing On Issue Of Whether Brief in District Court Was Timely Filed.

Unexpectedly, in 1988, a serious draught plagued the Midwest affecting many of the Needler firm's clients (it's practice is almost entirely limited to serving farm debtors in Chapter 11 proceedings). As a result, the Needler firm temporarily ran out of funds and it was necessary on February 15, 1989, to reduce the firm from four lawyers to one. The Chicago office was closed and small pilot space was secured in that city with no staff. Operations in the main were to be and are conducted at much lower cost at the firm's offices in Ogallala, Nebraska. (Affidavit of William Needler, A 37-39).

Handling the logistics of the appeal

of this case for the Debtor in the District Court at that time was Attorney James C. Truax,[3] who departed the Needler firm on February 15, 1989. The notice of appeal had been timely filed in the bankruptcy court on January 15, 1989.

On February 7, 1989, the final designation for record was filed by Debtor, and contained a request for the transcript of the evidentiary hearing on December 13, 1991, previously mentioned. (Motion to Reconsider, A 28)

The day before, on February 6, 1989, the "tapes" of the hearing had been ordered from the Clerk of the bankruptcy court who suggested that the tapes be transcribed in Chicago in order to save

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[3]Attorney Truax was not very familiar with all that had transpired below because Mr. Needler had handled those proceedings.

time. (Motion to Reconsider, A 21-22,29-30).

Mr. Needler, who took over the appeal from Mr. Truax did not at first understand that he was to employ a Chicago court reporter to transcribe the tapes. However, the tapes, after a short delay, were delivered to one of Chicago's best court reporters, Ms. Carol Raber. (Needler Affidavit, A 39-40).

However, due to an unexpected illness and a sudden flood of emergency matters, Ms. Raber could not promptly perform the task. It was not until April 22, 1989 that counsel received the transcriptions. (Needler Affidavit, A 39-41).

Meanwhile, debtor had applied for and received two extensions to file brief to and including March 27, 1989 (the brief being due by rule on February 22,

1989). (Dist. Ct. Memo, A 58-59).

On March 27, 1989, Debtor sought another three week extension to file brief to and including April 17, 1989. Either the District Court made a mistake, or for unstated reasons of its own, did not decide this motion. (A 58-59)

On or around April 18, 1989, Debtor's counsel found a mistake had been made on the firm's calendar due to the haste in closing down Chicago operations and the extraordinary work load resulting therefrom. The mistake was typical of a number of similar errors made while attempting to deal with the collapse of the Needler firm.

Attorney Needler, however, promptly prepared and filed a motion to extend time, which was received by the District

Court on April 19, 1989. Regrettably, in haste, Attorney Needler requested until April 31, 1989 to file the brief, when, of course, he should have requested May 1, 1989 (there being no April 31st date). (See Attorney Needler's affidavit and Motion to Reconsider for the above facts, e.g. A 24-28)

The District Court has expanded the two-day error in filing a fourth request for extension and the April 31st mistake into inexcusable neglect and a dismissal of the appeal. (See Order and Opinion of May 5, 1989 A 57-61.

On December 17, 1991, the Court of Appeals affirmed the District Court. In neither the District Court or Appellate opinions are there any findings on the merits of either the dismissed appeal or of the validity and reasonability of the

extension to file brief. The sole ground for refusal of the extension to file brief is that the reasons do not constitute "excusable neglect."

REASONS FOR GRANTING THE WRIT

I.
The Inability of Attorney Needler To Timely File Debtor's Brief Clearly Constituted "Excusable Neglect."

No one would argue that if counsel was run over by a car on his way to file his brief that the resulting delay could not be excused on the ground of excusable neglect, whatever the definition of that term might be. A similar catstrophe happened to the law practice of William L. Needler & Associates, Ltd. When the firm collapsed, Attorney Needler was left to practice alone. The firm could no longer afford to employ its three associate attorneys. Under those circumstances, Mr. Needler could not

succeed in preventing a disaster for the firm's clients without the cooperation of opposing counsel and the courts involved.

A very few sought unfair advantage, such as the government agency at bar (one of the government agencies largely responsible for the farm financial crisis in the first place).

Debtor suggests to this Court that such agencies are estopped by their conduct from seeking technical advantage in order to foreclose on the very persons they encouraged to overextend themselves.

While the Pioneer case in this Court was a 5-4 decision, the order of remand in this case was unanimous.

As Debtor understands this Court's decision and dissent in Pioneer, the majority thought it sound to expand and relax the concept of excusable neglect by

following the Webster dictionary definition, thus including late filings caused by "inadvertence, mistake or carelessness," as well as by intervening circumstances beyond the party's control" (the traditional legal definition in Black's Law Dictionary). In this way, the Rule might be general enough to afford relief for a broad variety of situations.

At bar, the Eighth Circuit does not recognize either definition, for the facts at bar fit squarely, not only within the former standard of inability to perform, but also within this Court's present relaxed standard of excusable negligence.

Clearly, the Eighth Circuit believes that there are few if any grounds upon which a debtor may be excused for a tardy filing of any kind. Be assured, however,

that relief under this Court's relaxed standard in favor of creditors will be much cited and relied upon by the Eighth Circuit when it comes to denying relief to debtors and affording relief to creditors. And therein lies the tragedy. The Eighth Circuit by distorting this Court's opinion in Pioneer, has simply arrogated to itself and the courts below more power to discriminate against debtors and to favor creditors. Further explanation and clarification by this Court is thus urgent and necessary. Were this Court to allow the second opinion and judgment of the Eighth Circuit to stand in this case, relief under the Bankruptcy Rules for debtors would be far more restricted than ever before, and the obstacle course for debtors greatly expanded, made far more expensive and

much more difficult.

The four-prong test for exercising discretion, proposed by the majority of this Court, is: "the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for delay . . . and whether movant acted in good faith."

At bar, it is clear that creditors could not have suffered any prejudice whatsoever from the short delay in filing Debtor's brief in the district court.

Indeed, no prejudice has ever been claimed by the Respondent.

As the record discloses, the record should never have been sent forward by the bankruptcy court clerk to the district court clerk without the transcript of proceedings filed --and in that event the brief would not have been

due. (For a more replete explanation of his point see A 39-40). Thus, there could be and was no possible prejudice to Respondent.

The short delay had no impact on the judicial proceedings, and no one has ever suggested that it did, since multiple extensions of time to file briefs for good cause shown are not uncommon. The reason for the short delay, the collapse of the Needler law firm, was beyond the control of the debtor and its attorney and there is no question that Attorney Needler acted in good faith when he strived to make good on the firm's duties and obligations. It was thus an abuse of discretion to hold that the filing of the brief in the district court was untimely.

II.
The Standard For Filing Briefs Late Should Not Involve Excusable Neglect

When this Court requested the Eighth Circuit to rethink its decision in this case based on its holding in Pioneer, it could not have envisioned that the Eighth Circuit would unfairly twist this Court's words to hold that an upheaval in a lawyer's law firm can never constitute excusable neglect. Such is the opposite of what this Court held in Pioneer.

Clearly, the majority of this Court thought to provide a rule general enough to cover all situations where there might be late filings. The problem here, according to the dissenters in Pioneer, is that such a rule leaves too much in the court's discretion when it comes to the late filing of claims.

So general a rule, encompassing the

"high crime" of failing to file a claim on time and the "petty misdemeanor" of filing a brief out of time, does not easily provide the necessary safeguards against the late filing of claims nor does it easily provide the relaxed and forgiving standard for the late filing of briefs.

"Excusable neglect" has never been the standard for the late filing of briefs. The discretionary "good cause" standard, always applied to the late filing of briefs -- and the only question ever asked was whether the debtor and its counsel had a reasonable excuse.

Dismissals for failure to timely file briefs have been rare to the point of non-existence in the past because bench and bar have extended courtesy and understanding with a transcendent

principle in mind: that the litigant should not be foreclosed unnecessarily from being heard.

Missing a bar date for filing a claim in bankruptcy, however, is a far different matter. Bankruptcy bar dates for filing claims in the past have been as sacrosanct as the bar dates for filing claims in probate. The transcendent principle is very different: that the courts cannot operate effectively in these areas without finality; that they simply cannot be caught up in endless litigation involving the late filing of claims; that the interests of all parties must regrettably give way to the courts and their efficient administration of estates, whether they be probate estates or bankruptcy estates. It is not that the courts do not sympathize with the

late filer of claims and wish they could afford relief, it is rather that experience teaches that estates will never be efficiently administrated if late claims are allowed on a discretionary flexible standard. Here there is room for vigorous argument as the dissenters in Pioneer have so eloquently demonstrated.

There is however no room for argument that late filings of briefs should be relieved on good cause shown.

Because the transcendent standards and their application are so very different, Petitioner suggests that the rules for late filings of briefs already in place, which do not involve excusable neglect, may be governing. In this regard, Petitioner adopts the arguments at pages 14 through 42 of its previously submitted Petition to this Court with the

thought that this Court might wish to clarify further what standard is to be applied in allowing the late filing of briefs. Space limitations here will not permit the repetition of these arguments, but suffice to say, all of the cases relied on by the Eighth Circuit are distinguished and disposed of at pages 14 through 42 of Petitioner's previous Petition.

For this Court's convenience a short excerpt from those arguments is supplied as follows (at p. 17-23 of previous Petition):

"Contrary to the opinions below, the district court is given the unreserved power to "specify different time limits" for the filing of appeals briefs by Bankruptcy Rule 8009(a). The standard is one of reasonable fairness, and an abuse

of discretion results unless gross negligence, bad faith or indifference have been shown (otherwise known as the "good faith" standard).

The standard is explained in In re Beverly Manufacturing Corporation (Brake v. Tavormina), 778 F. 2d 666 (11th Cir. 1985) as follows at p. 667:

> 'Construction of Bankruptcy Rule 8009(a)(1), requiring timely filing of briefs, is a matter of first impression in this circuit. Appellant suggests that we adopt the position of the Sixth Circuit, which has held that dismissal is proper only when bad faith, negligence or indifference has been shown. See In re Winner Corp., 632 F. 2d 658 (6th Cir. 1980). We consider this is a better approach, than one of routine

dismissal for failure to timely file briefs. First, it is consistent with this circuit's construction of the analogous Federal Appellate Rule, see Fed.R. App. P. 31(c) from which the Bankruptcy Rule has been adapted. See Bankruptcy 8009 (Advisory Committee Note). . . .'

As stated in Collier On Bankruptcy, 1991 ed., sec. 8009.03 Filing and Serving of Briefs, page 8009-4:

'The introductory language to subdivision (a) permits the district court or appellate panel by rule or order to shorten or extend the relevant time periods, or to excuse entirely the necessity for filing briefs. In certain instances the necessity for quick action may lead

to a less formal method of presenting arguments to the court. The Advisory Committee Note to Rule 8009 states that this language "allows local and individual variation" in the filing of briefs. The language clearly permits enlargement by order in a particular case, as well as general applicable variations by rule.'

Collier's further states at pages 8009-5,6:

'In a bankruptcy appeal if the appellant fails to file a brief, the appellee may move the court for sanctions pursuant to Rule 8001(a), which sanctions may include dismissal. The rule is permissive and does not require that the appeal be dismissed in every case in which

a brief is not filed on time.[4]

Also see Hoffman v. Alside, Inc., 596 F. 2d 822 (8th Cir. 1979) holding that sanctions other than dismissal may suffice where a brief is not filed on time, such as taxing costs; and In re Beck-Rumbaugh Associates, Inc., 80 B.R. 306 (E.D. Pa. 1987) holding that a failure to comply with a briefing schedule did not warrant dismissal of an appeal when no harm was caused by the late filing. However dismissal can result if there is a pattern of dilatory tactics and lateness exhibited by the negligent party. First National Bank of Maryland v. Markoff, 70 B.R. 264 (S.D.N.Y. 1987).

Norton Bankruptcy Law and Practice,

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[4]Citing In re Beverly Manufacturing Corp., supra.

1985 ed., Rule 8009, page 569-570, states:

> 'The sanction for noncompliance with the time requirements for the filing of a brief on appeal pursuant to Rule 8009 is not specified by the Bankruptcy Rules. Dismissal is "an especially drastic remedy reserved for 'rare occasions.'"[5] Since the dismissal of any appeal may be as injurious in effect as would be the dismissal of a case or proceeding-in-chief, appellate courts should exercise restraint in dismissing bankruptcy appeals because of the failure to file a brief on appeal within the time specified by Rule 8009. Not only do the

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[5]Citing Merker v. Rice, 649 F. 2d 171 (2nd Cir. 1981)

courts exercise restraint in dismissing proceedings for failure to comply with time requirements, but it has also been held that the exercise of sound discretion requires that lesser sanctions than dismissal be considered.[6] Alternative sanctions, such as costs, may be more appropriate. In the event of dismissal, the dismissing court is also required to articulate the reasons why "a less severe remedy" than dismissal was not used. Without such an analysis, meaningful appellate review of such decision is not possible.[7]"

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[6]Citing Schenck v. Bear Stears & Co., Inc. 583 F. 2d 58, 60 (2nd Cir. 1978.

[7]Citing In re Mac Meekin, 722 F. 2d 196, 199 (3rd Cir. 1983)

This Court should see to it that no litigant is denied his day in court or his appeal because of some minor procedural technicality, inability, inadvertence or confusion that has prejudiced no one.

Of all parties, it ill behooves the government or any of its instrumentalities and agencies to stand in the way of a farmer's reorganization.

III.
This Court Should Require Respondent to Pay Costs Previously Ordered By This Court.

Attached hereto as Appendix A 53 , is a letter from Respondent's counsel refusing to pay the costs previously ordered by this Court. Petitioner requests this Court to order the Respondent to pay said costs and any other costs which may be hereafter awarded.

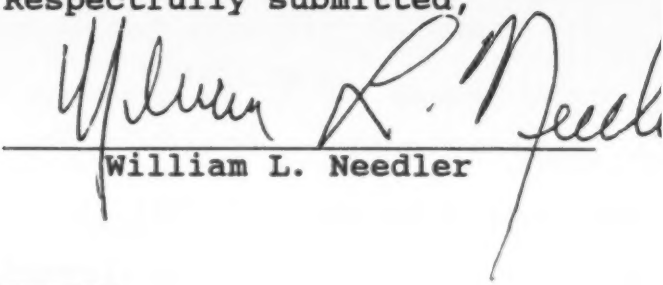
CONCLUSION

Petitioner, Harlow Fay, Inc., requests this Court to hear and grant its Petition for Writ of Certiorari (and/or Mandamus) to the United States Eighth Circuit Court of Appeals, to reverse and vacate the judgments below dismissing Petitioner's appeal, with instructions to allow Petitioner's brief on appeal to be filed in the District Court and for the District Court to render an opinion and judgment on the merits of the appeal, and to grant a stay of its dismissal order until it has done so.

Additionally, Petitioner requests whatever other relief this Court deems equitable and just, and particularly to direct respondent to obey this Court's

prior order directing payment of costs.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1199

In Re: Harlow Fay, Inc., Debtor.	)	Appeal from the United States District Court for the Eastern District of Missouri
Harlow Fay, Inc., Appellant,	)	
v.	)	(TO BE PUBLISHED)
Federal Land Bank of St. Louis, Appellee,	)	

Submitted: May 10, 1993

Filed: May 21, 1993

Before McMILLEN, FAGG and BOWMAN, Circuit Judges.

This case comes before us on remand from the United States Supreme Court. In re Harlow Fay, Inc., 951 F. 2d 176 (8th Cir., 1991 (per curiam) (Harlow), we held

that the district court[1] did not abuse its discretion in denying the request of Harlow Fay, Inc., (debtor) for additional time to file a brief on the ground that debtor had failed to establish excusable neglect under Bankr. R. 9006(b)(i). In Pioneer Invest. Services v. Brunswick Assoc. Ltd. Partnership, 113 S. Ct. 1489 (1993) (Pioneer), the Supreme Court recently expanded on what constitutes "excusable neglect" under Bankr. R. 9006(b)(i). The court granted certiorari, vacated our decision in Harlow, and remanded for reconsideration in light of Pioneer. Harlow Fay, Inc. v. Federal Land Bank, 111 S. Ct. 1809 (1993). For the reasons discussed below we again affirm the judgment of the

[1]The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

district court.

BACKGROUND

Debtor defaulted with respect to a confirmed Chapter 11 plan. Debtor was then ordered to submit a modification to its confirmed plan no later than December 6, 1988. Debtor failed to submit the modification on time. However a week later, debtor attempted to file an untimely modification. On December 13, 1988, the United States Bankruptcy Court for the Eastern District of Missouri entered an order dismissing debtor's Chapter 11 petition.

On January 12, 1989, debtor appealed the dismissal of its bankruptcy petition to the district court. The district court notified debtor that its brief was due on February 23, 1989. On February 23, 1989, debtor filed a request for an

extension of time in which to file its brief. The district court granted an extension to March 13, 1989. On March 7, 1989, debtor filed a second motion for a two-week extension to file its brief. The district court granted the motion, and gave debtor until March 27, 1989 to file its brief. On March 27, 1989, debtor filed yet another motion requesting an extension until April 17, 1989, to file its brief. There is no indication that the district court ruled upon this request. Nonetheless, debtor did not file its brief on April 17. On April 19 debtor submitted a fourth request for an extension of time, to the non-existent date of April 31. On May 3 debtor lodged its brief with the court. The Federal Land Bank of St. Louis (FLB) moved to dismiss the appeal on the ground

that debtor's April 19 request for additional time and its brief were untimely filed.

On May 5, 1989, the district court denied debtor's request for additional time and dismissed the appeal on the ground that debtor failed to demonstrate "excusable neglect" under Bankr. R. 900(b)(i), (2) and Fed. R. Civ. P. 6(b)(2). Debtor sought reconsideration in the district court on the grounds that: (1) the district court erroneously stated, that debtor had requested a transcript which was not a part of the designated record; (2) financial pressures had forced counsel to reduce his staff of attorneys, which resulted in errors; and (3) counsel continued to face problems due to his firm's relocation. The district court denied debtor's motion

for the reasons previously stated, with the exception of the reference to the non-designated transcript. This appeal followed.

DISCUSSION

In Pioneer, the Supreme Court held that Bankr. R. 9006(b)(i) which authorizes courts in bankruptcy proceedings to accept late filings where failure to act is the result of "excusable neglect," contemplates that courts are permitted, "where appropriate, to accept late filings caused by inadvertance, mistake, or carelessness, as well as by intervening circumstances beyond a party's control." 113 S. Ct. at 1495. The Court also determined that "excusable neglect" under Fed. R. Civ. P. 6(b) is an "'elastic concept' and is not limited strictly to omissions caused by

circumstances beyond the control of the movant." Id. at 1496, citing 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, par. 1165, at 479 (2d ed. 1987).

The Court in Pioneer further concluded that the determination as to what sort of neglect is considered excusable is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." 113 S. Ct. at 1498. However, the Court also determined that in analyzing a party's untimely filing, "the proper focus is upon whether the neglect of [the party] and their counsel was excusable.

On appeal debtor argues, as it did in its motion for reconsideration in the district court, that counsel's financial pressures beyond his control, counsel's

relocation to Nebraska and the reduction in staff in counsel's office constituted excusable neglect for the untimely filing of its brief. Essentially, debtor argues that it should not be penalized for the omission of counsel who was ultimately responsible for the timely filing of the brief.

After a careful analysis of the issues raised in Pioneer, we again hold that the district court did not abuse its discretion in dismissing debtor's appeal on the basis that debtor failed to establish excusable neglect. Pioneer, 113 S. Ct. at 1499 ("[W]e give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date"); Hanson v. First Bank, 828 F. 2d 1310, 1314-15 (8th Cir. 1987) (abuse of discretion standard;

employee turnover not excusable neglect under Bankr. R. 9006(b)(1); Clinkscales v. Chevron U.S.A., Inc., 831 F. 2d 1565, 1569 (11th Cir. 1987) (attorney's busy practice not excusable neglect under Fed. R. Civ. P. 6(b)). Cf. Selph v. Council of Los Angeles, 593 F. 2d 881,883 (9th Cir. 1979) (confusion from moving law offices not excusable neglect under Fed. R. App. P. 4(a)).

Accordingly, we affirm the district court's judgment dismissing debtor's bankruptcy appeal and deny FLB's pending motion to strike and dismiss as moot its motion to dismiss.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1199

In Re: Harlow Fay, Inc., Debtor.	)	Appeal from the United States District Court for the Eastern District of Missouri
Harlow Fay, Inc., Appellant,	)	(TO BE PUBLISHED)
v.	)	
Federal Land Bank of St. Louis, Appellee,	)	

Submitted: November 18, 1991

Filed: December 17, 1991

Before McMILLEN, FAGG and BOWMAN, Circuit Judges.

PER CURIAM.

Harlow Fay, Inc. (debtor), appeals from the judgment of the District Court[2]

[2]The Honorable George T. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

for the Eastern District of Missouri dismissing its bankruptcy appeal for failure to timely file a brief. For reversal, debtor argues that the district court abused its discretion in refusing to excuse the untimely filing on the ground of "excusable neglect." We affirm.

On appeal from the bankruptcy court's dismissal of debtor's Chapter petition, the district court notified debtor that its brief was due on February 23, 1989. The district court granted an extension to March 3, and another to March 27. On March 27 debtor requested another extension to April 17. There is no indication that the district court ruled upon this request, but, in any event, debtor did not file its brief on

April 17. On April 19, debtor submitted its fourth request for an extension of time, to the nonexistent date of April 31. On May 3, debtor lodged its brief with the court. The Federal Land Bank of St. Louis (FLB) moved to dismiss the appeal on the ground that debtor's April 19 request for additional time and its brief were untimely filed.

The district court denied debtor's request for additional time and dismissed the appeal on the ground that debtor failed to demonstrate "excusable neglect" under Bankr. R. 9006(b)(1)(2) and Fed. R. Civ. P. 6(b)(2). Debtor sought reconsideration on the grounds that (1) the district court erroneously stated that debtor had requested a transcript which was not a part of the designated record;

(financial pressures had forced counsel to reduce his staff of attorneys, which resulted in errors; and (3) counsel continued to face problems due to his firm's relocation. The district court denied debtor's motion for the reasons previously stated, with the exception of the reference to the non-designated transcript.

Regardless of the difficulty debtor encountered in obtaining the bankruptcy transcript, debtor's April 19 request for an extension of time to file its brief was untimely, as was its May 3 filling. We therefore conclude that the district court did not abuse its discretion in denying the request for additional time on the ground that debtor failed to establish excusable neglect. See Hanson

v. First Bank, 828 F. 2d 1310, 1314-15 (8th Cir. 1987) (abuse of discretion standard; employee turnover not excusable neglect under Bank. R. 9006(b)(1); Clinkscales v. Chevron U.S.A., Inc., 831 F. 2d 1565, 1569 (11th Cir. 1987) (attorney's busy practice not excusable neglect under Fed. R. Civ. P. 6(b). Cf. Selph v. Council of Los Angeles, 593, F. 2d 881, 883 (9th Cir. 1979)(confusion from moving law office not excusable neglect under Fed. R. App. 4(a)).

Accordingly, we affirm the district court's judgment dismissing debtor's bankruptcy appeal. We deny FLB's pending motion to strike and dismiss as moot its motion to dismiss.

A true copy

Attest: CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

HARLOW FAY, INC., Debtor,	)	
HARLOW FAY, INC., Appellant,	)	No. 89-0015 C
v.	)	
FEDERAL LAND BANK OF ST. LOUIS, Appellee.	)	

MOTION TO RECONSIDER AND VACATE ORDER AND MEMORANDUM OF MAY 5, 1989, FOR ORDER PERMITTING FILING OF BRIEF INSTANTER, AND FOR IMPOSITION OF A STAY UNTIL THIS MOTION CAN BE HEARD AND DECIDED, AND FOR OTHER RELIEF DEEMED EQUITABLE [AS AMENDED BY FURTHER MOTION].

NOW COMES HARLOW FAY, INC., by and through its attorneys, William L. Needler & Associates, Ltd., and moves this Court to reconsider and vacate its order (rehear) and memorandum of May 5, 1989 denying Appellant an extension of time to

file brief and dismissing this appeal. Appellant also requests this Court to permit it to file said brief instanter on the showing of both good cause and excusable neglect. Additionally Appellant requests this Court to impose a stay of the order dismissing Appellant's Chapter 11 proceeding of December 13, 1988 entered by the Bankruptcy Court and this Court's order of May 5, 1989 dismissing this appeal, until this Motion can be heard and decided and until the Court of Appeals, if necessary has had an opportunity to consider this matter. Finally, Appellant requests any other relief which is equitable and just. In support thereof, Appellant states as follows:

1. There is no question that appellant has been diligent and is

deserving of the relief requested.

2. On May 1, 1989, the Appellant mailed for filing its opening brief in this matter to this Court. Under the circumstances of this case, entirely beyond the control of the appellant and its counsel, there was absolutely no possibility that this brief could be submitted earlier; and this brief should be deemed timely filed, event though Appellant's fourth motion for extension of time mistakenly requested April 31, 1989 (a non-existent date) rather than Monday, May 1, 1989 as intended. Even were Appellant's request considered to be for April 30, 1989, and this Court had ordered the brief to be submitted by that date, April 30, 1989 being a Saturday, the effective date would be Monday, May 1, 1989 since the Clerk's office is

closed on Saturday and no papers can be filed until Monday. See Bankruptcy Rule 9006. Even were that not so, Appellant would have a right to request relief under Federal Rule of Civil Procedure No. 60(b), and does so, for mistake, inadvertence, etc. The brief is timely as filed on Monday, May 1, 1989 because the Bankruptcy Appeals Rules (Rule 8008) adopt the rule of the Untied States Supreme Court "except that briefs shall be deemed filed on the date of mailing." This rule evens out the disparity between counsel with their offices on the doorstep of the courthouse and those who operate at a distance, and facilitates filing and service on the same day as envisioned by Rule 8009. The dilemma is easily perceived. If the rule were not as it is, there would be service required

before the due date from a practitioner with offices at a distance from the courthouse, since a certificate is required for filing that the parties have been duly served. It is, of course, not essential that the court receive a brief on a specific due date, since no immediate action is required upon it-- so that the rule for briefs in the Supreme Court of the United States deeming briefs to be filed on the date of constructive service (mailing) works well in practice. There can be no question that the rules are designed to assist as far as is possible the practitioner who operates from a distance, since this also encourages a specialization which the Supreme Court, for one, is anxious to promote in complex areas such as bankruptcy. Also, there is a long-

standing due process argument that has never been really resolved to the effect that there is an impermissible procedural disadvantage where [constructive filing of papers is not allowed in the face of a rule or law permitting such filing.][1] Appellant asserts this constitutional argument should it be the position of this Court, contrary to the Bankruptcy Code, that briefs must actually be filed on the date ordered rather than constructively filed. Appellant submits that Appellant's brief was timely filed pursuant to its fourth motion for extension of time to file brief.

3. As stated by this Court, the final designation of the record on appeal was entered on this Court's docket on

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[1]Added by amendment, filed May 18, 1989.

February 7, 1989. However, this Court errs when it states that Appellant has offered as a reason for extension of time a difficulty "due to the court reporter's illness in obtaining a transcript of a Rule 2004 hearing (which is not presently part of the designated record on appeal"). It is true that the transcript for the 2004 hearing is not designated, and it is also not needed for appeal. The Appellee objected to its inclusion and Appellant has not used any part of it on appeal. Actually, the Appellant was glad to have Appellee's reassurance that the 2004 hearing should not be part of this appeal, since as far as Appellant is concerned the matters there were simply cumulative and not decisive. The transcript that Appellant had difficulty in obtaining, due to the reporter's

illness, was that of the hearing on December 13, 1988 wherein the Bankruptcy Court had dismissed Appellant's Chapter 11 case. This transcript was needed for appeal and is required under the rules. As substantiated by the affidavit of Appellant's counsel, this transcript was not obtained until Saturday, April 22, 1989 and Appellee's brief was mailed on Monday, May 1, 1989, nine days later, on the first business day when a copying service could be employed to reproduce it after final drafting on Saturday, April 19, 1989. A copy of the transcript of December 13,1989 has been served upon Appellee's counsel.

4. It is true that considerable confusion has surrounded this transcript. In the first place, William L. Needler was forced by circumstances to assign the

details of this appeal to his then assistant, Attorney James C. Truax, who was not entirely familiar with all that had transpired below. In particular, Mr. Truax labored under the misapprehension t hat the main evidentiary hearing that took place on November 15, 1988 was read into, merged and made a part of the final hearing of December 13, 1988. This misapprehension was reinforced by the fact that Mr. Truax received two tapes indicating a very lengthy hearing. (Actually the hearing started near the end of the first tape and used only a portion of the second tape). Since Mr. Truax left the firm on February 15, 1989 and was not being paid thereafter, and the tapes were order by letter of February 6, 1989 and not received until after Mr. Truax's official departure, t

here was no reason to believe that the tapes did not include the evidentiary hearing. The law firm of William L. Needler & Associates, Ltd. would emphasize that it deeply regrets the loss of Mr. Truax and its other personnel in Chicago, and that such loss was entirely beyond the control of the firm, its personnel or anyone else. (See affidavit of William L. Needler attached). In order to conserve costs in this bankruptcy case, rather than have this evidentiary transcript of November 15,1988 reproduced in full, that those portions be supplied which would settle any dispute of facts in the few arguments involved. Appellant, however, is confident that there is no fact recited in its opening brief which is disputed.

5. As stated, this Court granted

Appellant's second motion for extension of time to file brief to and including March 27, 1989. So far so good. When however, Appellant could not meet this date, Appellant timely filed, on March 27, 1989, a third motion for extension of time to and including April 17, 1989 to file its brief on appeal. Technically, because this Court had entered no order permitting the filing of Appellant's brief on or before April 17, 1989, there was nothing to enlarge and Appellant's fourth motion for extension of time merely served as an amendment to its third request, so that Rule 9006 did not apply. The fact that there was confusion on the docket of Appellant's attorney and said fourth motion was mailed by Express Mail late in the evening of April 17, rather than received on that date by this

Court is not debilitating, since good causes is the standard and not excusable neglect. But the fact is the Rule 9006 does not apply at all.

6. Bankruptcy Rule 8009 specifically gives this Court the power to set different time limits in the filing of briefs and this power is not restricted by the general time limitations set forth in Rule 9006. The only standard is abuse of discretion which would occur where good cause is shown. This has to be true, for , with all due respect, to imagine that the standard for extending the time for submitting briefs in a bankruptcy appeal is different in the Court than it is in the Court of Appeals is preposterous. The Court of Appeals for good cause shown may permit an act to be done after the

prescribed time (F.R.A.P. 26(b). The Rules in Part VIII of the Bankruptcy Rules are patterned after the Federal Rules of Appellate Procedure,[1] and these rules should be consulted when construing the Bankruptcy Rules as a whole in their application to the Appeals Rules contained in Part VIII. In relation to the time for filing briefs, the Bankruptcy Rules (8009) give this Court unlimited discretion in the matter of when briefs should be filed (otherwise the rules would have made plain that extension of time for filing briefs may be had on good cause shown both before and after the expiration of the time set). Abuse of discretion would therefore be the only standard (or good cause shown).

7. All of the reasons for delay set forth by counsel for Appellant are cogent and not only provide good cause for extension but also constitute excusable neglect. Appellant's counsel supplies this affidavit to underscore and make more indelible the very good and sufficient grounds for extension to file brief and to allow Appellant's opening brief to be filed instanter. This Court has correctly stated that the excusable neglect standard is "beyond the reasonable control of the person whose duty it was to perform." In any event, Appellant has shown good cause, and that is all that is necessary.

8. As this Court points out, the final designation was filed by Appellant on February 7, 1989. This designation contained a request for the transcript of

December 13, 1989 which was the hearing wherein the Bankruptcy Court announced its reasons for dismissing the Chapter 11 proceeding. Rule 8006 requires the inclusion in the record of any opinion, findings of fact and conclusions of law of the court (and such are invariably contained in the transcript of proceedings where the action is taken). Such is the case at bar. Due to circumstances entirely beyond to the control of Appellant's counsel, the transcript could not be procured until Saturday, April 29, 1989. We would not again employ someone in Chicago to transcribe the tapes of a hearing in another jurisdiction, since that person is not aware of the local rules and other details that make the process go smoothly. However, the suggestion of the

Clerk was to handle the matter as it has been handled. of course, no one could know that the Court Reporter would become ill and fall so far behind in her work due also to a surprise onset of emergency matters that she would be unable to perform as promised. This was all beyond the control of Appellant's counsel.

9. Additionally, the staff of counsel for Appellant has temporarily and suddenly been reduced to one lawyer where there were four before. Mr. Needler has been working almost steadily fourteen hours a day, seven days a week, to handle the situation, and while relief is in sight there could in the interim be considerably more than the usual number of foot faults and errors develop. All of this was entirely beyond the control of Appellant or its counsel, and consists

largely of the inability of clients to pay due to the draught consideration that have swept the midwest -- and the corresponding necessity to at once reduce overhead by dispensing with the Chicago office and most all of its personnel. (See affidavit attached).

10. As demonstrated in the brief received by this Court, there is a likelihood that Debtor-Appellant would prevail on appeal in this matter were this Court to vacate its order dismissing this appeal and hear the appeal. Debtor-Appellant would be irreparably and irrevocably harmed if a stay is not granted, since its business would be destroyed if a foreclosure of the land were permitted.[1] Upon filing of the brief, it had been Appellant's intention

to seek a stay in the bankruptcy court with the brief demonstrating the likelihood of Appellant's prevailing. However, it is not now possible to seek such a stay in the bankruptcy court due to the dismissal of the case. Consequently, in exercise of its original jurisdiction under 28 U.S.C., sec. 1334 and its Appellant jurisdiction under 28 U.S.C. 158 and Bankruptcy Rule 8005, Appellant request this Court to (a) enter a stay of its May 5, 1989 order dismissing this appeal until this Motion can be heard and decided and for an additional 15 days until an appeal and stay order can be presented to the Court of Appeals, and further impose a stay of the order dismissing Appellant's Chapter 11 case, entered December 13, 1989, also for the time above mentioned. Clearly,

the balance of harm tips in Appellant's direction, since its loss of property and livelihood resulting from no stay would far outweigh a short delay in foreclosing by Appellee. Moreover, public policy would favor a stay since it is in the public interest to preserve family farms and the American farm system, not destroy it.

WHEREFORE, Appellant Harlow Fay, Inc. requests this Court to enter an order granting the following relief:

a. Reconsider, vacate, alter, amend and modify its Order and Memorandum of May 5, 1989 and grant Appellant the right to file its brief instanter;

b. Impose a stay of the order dismissing Appellant's Chapter 11 proceeding of December 13, 1988 by the Bankruptcy Court and a stay of this

Court's order of May 6, 1989 until this Motion can be heard and decided, and if necessary,, for 15 days thereafter until the Court of Appeals has had an opportunity to consider this matter.

c. For any other relief that is equitable and just.

Respectfully submitted,

/s/ William L. Needler

A F F I D A V I T

William L. Needler, an attorney, on oath deposes and says:

1. Affiant is counsel for Debtor-Appellant in this cause. Counsel is President and senior attorney for the firm that bears his name, William L. Needler & Associates, Ltd.

2. Affiant is one of the more well-known attorneys representing farm debtors in Chapter 11 proceedings in many

jurisdictions. Affiant has testified before the Senate Subcommittee that considered Chapter 12 legislation and his opinion is valued and followed. In re Timbers Inwood Forest Associates, Ltd., 808 F. 2d 363 (5th Cir. 1987) at pages 365 and 367, footnotes 3 and 7. The Needler firm practices in some 20 jurisdictions and has handled or is handling over 200 Chapter 11 reorganizations of farmers. Affiant states that you can count the unsuccessful reorganizations of farmers he has participated in on two hands, and has just been congratulated by the bankruptcy judge in Iowa on confirming his thirtieth Chapter 11 case in that jurisdiction.

3. Needless to say, the Needler firm has encountered militant resistance from lenders -- including the Federal

Land Bank of St. Louis (now Farm Credit System of St. Louis), the Appellee in this case. It is the thinly-disguised ambition of the Appellee to eliminate the Needler firm if it can as an unwelcome burr under its saddle.

4. Unfortunately, the Needler firm was unable to win elimination of the "absolute priority" rule in Norwest Bank v. Ahlers, 108 S. Ct. 963 (1988), but it continues to work on and around this problem. Affiant is gratified to report that the Needler firm's assessment and theory of the Ahlers case has proven accurate. During the time the case was being litigated, the Ahlers recovered and they have made the substantial profits predicted by the Court of Appeals. The Ahlers were therefore in a position to settle with the Ahlers' secured creditors

and their Plan is now finally confirmed. The Ahlers were not dying farmers and the so-called "elixir" which, according to the bankruptcy court, the Needler firm was supposed to be selling to the Ahlers' turned out to be sweet and effective. The Supreme Court congratulated the Needler firm in Ahlers on its eloquent defense of farmers. (See portion of brief attached to which the Supreme Court referred).

5. Affiant regards the work of the Needler firm to be in great part a public service and the Needler firm has over two million dollars in receivables due from its farmer clients to prove it. The Needler firm has never jeopardized the reorganization effort of a farmer by requiring its fees as part of the confirmation process. However, the time

comes when the Needler firm must require reasonable payments from those who can pay in order to stay in business and serve other farm debtors with more complex problems.

6. Unexpectedly, a serious draught plagued the Midwest early this year, affecting many of the Needler firm's clients (its practice is almost entirely limited to serving farm debtors in Chapter 11 reorganization proceedings). While it does do an occasional Chapter 12, these are usually handled and can be handled by the average local practitioner. The draught meant that many of the Needler firm's clients were unable to pay and the Needler firm temporarily ran out of funds. This meant that the Needler firm had to close down its Chicago operation on February 15, 1989

and with great reluctance and regret dispense with most of its personnel including the three lawyers that assisted Mr. Needler. One of these was Mr. Truax who was handling the appeal in this case. There was confusion resulting from the lack of personnel as to the due date of April 17 (extension was not properly docketed).

7. Affiant at first did not quite understand the significance of the tapes of proceedings which had been ordered and that he was to hire some court reporter in Chicago to create a transcript of proceedings. When affiant understood what was involved, he immediately conveyed the tapes to Ms. Carol Raber, an extremely fine court report who could ordinarily make very short shrift of the task. However, due to an illness coupled

with an unexpectedly sudden flood of emergency matters, Ms. Raber was unable to keep her commitment and affiant had to apply for successive further extensions. As affiant understands it, the record should not have been conveyed to this Court until the transcript was filed and in the record. However, since the record had been conveyed, it seemed to affiant that the proper procedure was request successive extensions of time under the circumstances. Certainly this, coupled with affiant's unfamiliarity with the procedure of having taped transcriptions transcribed, should bear heavily on whether there was excusable neglect at bar, if that be the standard.

8. The Needler firm's move to Ogallala, Nebraska and Northbrook, Illinois is still not entirely completed

and there are many continuing problems to face. Most all courts have been very cooperative and have endeavored to grant whatever extensions of time have been requested by the Needler firm so that its clients would not be foreclosed because of no fault of their own and because of circumstances beyond the control of their attorney.

9. To give this Court some idea of the logistics involved, the Needler firm, as previously stated, received the transcript from Ms. Raber on Saturday, April 22, 1989. On Monday, affiant was in Ogalalla, Nebraska preparing for trial in In re Liebrandt to take place on April 25 and 26. Affiant had enlisted the services of a former attorney in the firm to assist in the preparation of the brief in this appeal. April 25 and 26 were

primarily spent in preparing settlement documents in Liebrandt supra which did not go to trial after all. Additionally, on April 25, 26 and 27, affiant put out fires in the following cases: Brakhahn, Johnson, Knapple, Barger, McDowell, Opine, Alleman, Hilton, Ziebarth, Kvamme, Lewis, Duncan and Kinnan; and on the afternoon of the 27th drove part of the way to Topeka to attend a 341 meeting on April 28 in In re John Johnson. On April 28 and 29, affiant put out fires in Heitheusen, John Johnson, Bairn, Opine, Couchman, Squires, Ziebarth, Regier, McDowell, Foster and Smith, and then flew to Chicago on the evening of April 29. On April 30, finally reviewed the brief herein and prepared for important settlement negotiations in Chicago Bank of Commerce v. Amalgamated Trust &

savings Bank in Chicago. Affiant also prepared other documents in this case attendant to the filing of the brief. On May 1, after settlement negotiations in Chicago Bank of Commerce, supra, affiant flew to Sioux Falls, S.D. for trial on May 2 at 9:00 a.m. in First Bank v. Marvin & Ellen Speck. Affiant has been similarly totally engaged since February 15, 1989 when the closing of the Chicago office and the loss of its personnel occurred, and in any event required the extensions.

10. If called, affiant can swear to the truth of the above.

/s/ William L. Needler

Subscribed and Sworn to
before me this 13th day
of May, 1989.

/s/ Hugh Dunlop, Jr.
Notary Public

Exhibit to Affidavit - Excerpt from Debtor's brief to this Court in In re Ahlers:

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Another drawback of Chapter 12 is the continuing jurisdiction of the Court and its Trustee over the affairs of the debtor, which is not only very costly, but unduly restricts debtor's capacity to run his business in the normal course.

This Court should not be misled by the inferences of Petitioners and the Solicitor General that Chapter 12 with its elimination of the absolute priority rule is a viable alternative for farmers.

Farm debtors cannot afford an absolute priority rule that defeats their reorganization efforts before they start.

As stated in Federal Reserve's Agricultural Letter, July 3, 1977, p. 2 (App. 3a), there was a rapid escalation

of farmland values throughout the Midwest between 1970 and 1980 and a corresponding enormous increase in debt. Farmland prices which had soared twelve-fold between 1950 and 1980 climbed four-fold between 1970 and 1980 in the Seventh Federal Reserve District. Farmland prices and all other farm prices were permitted to rise drastically in the face of radically increasing demands for farm products (Outlook, Wall Street Journal, Mon. Aug. 26, 1985).

As conceded by the Federal Reserve, "U.S. domestic agricultural and macroeconomic policies inadvertently enhanced export opportunities of other nations," and the situation "was further exacerbated by domestic macroeconomic policies that contributed to the rising exchange value of the dollar." (Letter,

p. 2, App. 4a, 5a).

As worldwide demand grew, inflation soared and interest rates rose to high double digits. The government told farmers to farm fence to fence to feed a hungry world and at the same time advised farmers that costly new machines and methods could greatly enhance production

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and profits. Farmers were advised that they would perish if they did not keep up with the times. Lenders, government and agricultural suppliers urged farmers to expand and improve their operations or perish. Farm debt grew from $50 billion in 1970 to $200 billion in 1985. (See Time Magazine, 2/18/85, p. 27-8).

All of this was made possible by the government's change of lending rules in 1971. In 1971, the government stopped

making farm loans on a farm's ability to pay from cash flow on its operations and instead started to lend on the highly inflated and inflatable market value of the farm. (Wall Street Journal, Review and Outlook, p. 22, 12/6/85).

Left out of the Federal Reserve's analysis are the facts that the government was not just partly responsible for the present farm crisis but almost entirely responsible for it.

By 1980, Congress had authorized farm loans up to an irresponsible 97% of those obviously inflated market values. (Wall Street Journal, Review and Outlook, p. 22 12/6/85).

It was an old story. Farmers, who for generations had been taught by their fathers to beware of implement sales men who advised farmers to go modern or go

bust, were now assured by the government and the nation's most influential and respected lenders and agricultural lenders that a farmer would be left behind if he did not modernize and expand.

In 1981, the bubble burst when worldwide glut slashed demand for U.S. farm products abroad due to U.S. "macroeconomic policies."

Prices fell drastically and precipitously. Suddenly, without warning, farmers could not make enough from crop sales to cover repayment of their loans. As farmers were forced to sell their equipment, livestock and land to meet loan payments, prices dropped even further and the financial crisis became a nightmare. Over time, at least one-fourth of the nation's grain farmers found they had

large deficiency claims against them. As of January 1987, over forty-six (46%) percent of all U.S. farmers had a neg-negative or zero cash flow (See Brief of the States, p. 1-3; Time Magazine, 2/18/85. p.28).

The farm credit system admits it is insolvent and has received a government bailout in the billions to meet its commitments and assist farm debtors. Forty-two (42%) percent of the Department of Agriculture's Farmers Home Administration loans in Nebraska were delinquent and thirty (30%) percent of Iowa farmers with less than $800,000 in assets were behind in their payments as of February, 1985 (Chicago Tribune, Monday, February 4, 1985, "Bank Failure Tightens Noose on Rural Town.") The number of farm foreclosure escalated

dangerously through 1986. Over 70,000 farms were lost in 1986 alone. The view that, if a farmer does not have the support of the secured creditors in a consensual reorganization, he cannot reorganize, reached full flower largely through the astounding influence of lenders and their governmental supporters.

The Ahlers are not governmental or private financial experts or lenders, captains of industry, Philadelphia lawyers, or agri-business leaders all of whom posses the means and capability of forecasting prudent courses of economic conduct. They are plain folks who must depend upon prominent persons in the community and the government for guidance. They have especially depended on the Federal Land Bank, the Norwest

Bank and the government to assist them, to forebear, to deal fairly with them in time of need and to help them through. That is the least they had a right to expect when they were caught up in a crisis not of their own making, but one entirely created by those who now demand their demise. It is incomprehensible that Norwest and the Federal Land Bank would prefer disastrous liquidation losses rather than performing loans on their books when the tide appears to have turned and farmer's (like the Ahlers') chances of reorganizing to the benefit of all of their creditors seem brighter. Equity is all on the side of the Ahlers. In no court has this been denied by the Petitioners.

If the government, agri-business, and lenders could be held in tort for

their negligence and irresponsibility in creating the present farm financial crisis, the Ahlers and other farmers like them would be owed many billions of dollars.

The Ahlers do not ask for redress. They ask for an opportunity to pay their creditors a reasonable and fair amount through the process of reorganization under Chapter 11, rather than deserting their creditors and canceling their losses in a Chapter 7 proceeding. It is ironic that the government and Petitioners suggest an interpretation of the absolute priority rule that prevents the Ahlers from doing what is moral and right.

SUPREME COURT OF THE UNITED STATES

No. 91-1800

HARLOW FAY, INC.,

Petitioner

v.

FEDERAL LAND BANK OF ST. LOUIS

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and responses thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgement of the above court in this cause is vacated and the case is remanded to the United States Court of Appeals from the Eighth Circuit for further consideration in light of Pioneer Investment Services Company v. Bruswick

Assocaites, Limited Partnership, 507 u.S. ____ (1993).

IT IS FURTHER ORDERED that the petitioner Harlow Fay, Inc., recover from Federal Land Bank of St. Louis Three Hundred Dollars ($300.00) for its costs herein expended.

April 5, 1993

Clerk's costs: $300.00

RENDLEN, RENDLEN, REDINGTON and BASTIAN
Attorneys At Law
800 Broadway
P.O. Box 1255
Hannibal, Missouri 63401

May 25, 1993

William L. Needler
Attorney at Law
106 West First Street
P.O. Box 177
Ogallala, NE 69153

Re: AgriBank, FCB v. Harlow Fay, Inc.

Dear Mr. Needler:

It is my understanding that the Supreme Court has allowed an assessment of $300.00 against my clients on behalf of your clients.

In light of the Eighth Circuit's ruling applying the Pioneer Investment Services Company v. Bruswick Associates Limited Partnership case to the facts in Harlow Fay, my clients have applied the $300.00 towards the outstanding legal obligation of your clients. The legal obligation of your clients as of 05-24-93 was $439,365.89 with per diem at $98.52 per day.

If you have any questions, please let me know.

RENDLEN, RENDLEN, REDINGTON &
BASTIAN, P.C.

By:_____
C. E. "Sketch" Rendlen III

CER,III/fm

pc: William J. Prebil, AgriBank FC
Charles Vandivert, AgriBank FCB

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

HARLOW FAY, INC.,	)	
	)	
Debtor.	)	
	)	
HARLOW FAY, INC.,	)	
	)	No. N 89-0015C
Appellant,	)	
	)	
v.	)	
	)	
FEDERAL LAND BANK OF ST. LOUIS,	)	
	)	
Appellee.	)	

ORDER

Pursuant to the memorandum filed on this date herein,

IT IS HEREBY ORDERED that appellant's motion for an extension of time to file its brief in this cause be and it is denied.

Accordingly,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Harlow Fay, Inc.'s appeal be and it is dismissed.

Dated this 5th day of May, 1989.

/s/ George T. Gunn
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

HARLOW FAY, INC.,	)
	)
Debtor.	)
	)
HARLOW FAY, INC.,	)
	)
Appellant,	)
	)
vs.	)
	)
FEDERAL LAND BANK OF ST. LOUIS,	)
	)
Appellee.	)

MEMORANDUM

This matter is before the Court on the fourth motion of debtor-appellant Harlow Fay, Inc. for an extension of time to file its brief on appeal. On December 13, 1988 the United Sates Bankruptcy Court for the Eastern District of Missouri entered an order dismissing debtor-appellant Harlow Fay, Inc.'s petition. On January 12, 1989 appellant

timely filed its notice of appeal. On February 7, 1989 the final designation of the record on appeal was entered on this Court's docket. On February 22, 1989, the date on which appellant's brief was due, it filed a request for extension of time to and until March 13, 1989 to file its brief on appeal. On March 7, 1989 appellant filed a second motion for extension of time requesting an additional two weeks to and including March 27, 1989 to file its brief. This Court granted this motion on March 21, 1989. On March 27, 1989 appellant again sought a three-week extension of time to and including April 17, 1989 to file its brief on appeal. Appellant did not file its brief on April 17, 1989 or seek an extension of time to do so until April 19, 1989. On April 19, appellant filed a

fourth motion for extension of time to and until the non-existent date of April 31, 1989. On May 3, 1989 appellant lodged its brief with the Court.

Appellant has offered various reasons for its persistent delay in filling the brief: change of counsel, relocation of present counsel's offices, difficulty due to the court reporter's illness in obtaining a transcript of a Rule 2004 hearing (which is not presently a part of the designated record on appeal), and confusion in counsel's office as to required filing dates in bankruptcy matters.

Pursuant to Bankruptcy Rule 9006(b)(1)(2) and Federal Rule of Civil Procedure 6(b)(2), the Court may extend the time for filing upon a showing of "excusable neglect." This standard

requires the movant to show that the failure to perform was due to circumstances beyond the reasonable control of the person whose duty it was to perform. In re Overly-Hautz Co., 57 B.R. 932 (Bankr. N.D. Ohio 1986). None of the reasons for delay offered by appellant's counsel satisfies this standard. See Hanson v. First Bank of South Dakota, 828 F. 2d 1310 (8th Cir. 1987); In re Carlton, 72 B.R. 543 (Bankr. E.D.N.Y. 1987); In Re Murphy, 1 B.R. 736 (Bankr. Cal. 1979). Inasmuch as appellant has failed to demonstrate excusable neglect, appellant's request for an extension of time to file its brief on appeal must be denied and this appeal dismissed.

Dated this 5th day of May, 1989.

/s/ George T. Gunn
United States District Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

In re	)	
	)	
HARLOW FAY, INC.,	)	Case No.
	)	8500119(N)
Debtor.	)	

N O T I C E

TO: DEBTOR, DEBTOR'S ATTORNEY, U.S. TRUSTEE, CREDITORS AND PARTIES IN INTEREST:

PLEASE TAKE NOTICE THAT the following Order was entered on December 13, 1988 dismissing this bankruptcy petition filed on April 29, 1985.

> "This matter is before the Court on the Motion of the Federal Land Bank of St. Louis to Dismiss and the Motion For Relief from the Automatic Stay of Farm Credit Bank of St. Louis as successor to the Federal Land Bank of St. Louis filed October 3, 1988, and on the Debtor's Motion to Modify Note filed October 12, 1987, as amended by Debtor's proposed Revised Modification of December 13, 1988. The court has considered the Pleadings and the argument of the parties and the evidence adduced at the Hearings on these Motions held September 13, 1987, November 15, 1988 and December 13, 1988. The Court finds that Debtor is in material default with

respect to a confirmed Plan under 11 U.S.C. Section 1112(b)(8) of the Bankruptcy Code. The Court further finds that the proposed modifications of the Plan by Debtor fail to meed the requirements of 11 U.S. C., Section 1127 of the Bankruptcy Code, that the Revised Modifications of December 11, 1988 and December 13,,1988 were not timely filed within the time specified by this Court and that circumstances in this case do not warrant such modification.

IT IS THEREFORE ORDERED that Debtor's Motion To Modify Note and the revised Modification of December 13, 1988 is denied. IT IS FURTHER ORDERED that the Motion To Dismiss of Federal Land Bank of St. Louis is granted and this Chapter 11 proceeding is dismissed."

NOTICE IS HEREBY GIVEN THAT the automatic stays resulting from Debtor's bankruptcy petition are terminated.

/s/ David P. McDonald
U.S. Bankruptcy Judge

Dated: December 19, 1988
St. Louis, Missouri

BANKRUPTCY RULE 8008(a)

(a) Filing. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; and an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court of bankruptcy appellate panel may require that additional copies be furnished.

BANKRUPTCY RULE 8009(a)

(a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file a brief within 15 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and

file a reply brief within 10 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

BANKRUPTCY RULE 9006(b)

(b) Enlargement.

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of

court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(2) Enlargement Not Permitted. The court may not enlarge the time for taking action under Rules 1007(d), 1017(b)(3), 1019(2), 2003(a) and (d), 7052, 9015(f), 9023, and 9024.

(3) Enlargement Limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to

the extent and under the conditions stated in those rules.

FEDERAL RULE OF CIVIL PROCEDURE 6(b)(2)

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within specified time, the court for cause shown may at any time in its discretion

(1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or

(2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect, but it may not extend the time for taking any

action under rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b) and 74(a), except to the extent and under the conditions stated in them.

FEDERAL RULE OF CIVIL PROCEDURE 60(b)(1)

RULE 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

FEDERAL RULE OF APPELLATE PROCEDURE 31(c)

(c) Consequences of Failure to File Briefs. If an appellant fails to file a brief within the time provided by this rule or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

FEDERAL RULE OF APPELLATE PROCEDURE 26(b)

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for

allowance or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the U.S. except as specifically authorized by law.

FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(5)

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise

requires. Notice of any such motion which is filed after the expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.